Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CC Docket No. 97-151
	)	
	)	
Amendments of the Commission's Rules and Policies Governing Pole Attachments	)	

REPLY COMMENTS OF U S WEST, INC.

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TABLE OF CONTENTS

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REPLY COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby submits its replies to comments filed on September 26, 1997, on rules that the Federal Communications Commission ("Commission") should adopt to ensure that rates charged telecommunications carriers for poles, conduits, and rights-of-way are just, reasonable, and nondiscriminatory.

I. INTRODUCTION AND SUMMARY

Comments in this proceeding were filed by 30 parties, including local exchange carriers ("LECs"), electric companies ("electrics"), interexchange carriers ("IXCs"), wireless providers, and cable companies. As a rule, LECs and electrics took positions which were at odds with cable companies and IXCs. As "neither fish nor fowl," U S WEST often found its position on pole attachment issues at odds with both LECs and cable companies. This is not surprising since, in arriving at its position, U S WEST had to balance many of the same interests that are facing the

Commission in this proceeding. In developing its position, U S WEST believes that it has arrived at many "workable" compromises which equitably balance the interests of pole owners and pole renters.

In these reply comments, U S WEST supports the continued use of negotiated agreements to provide access to poles and conduit. However, U S WEST opposes any rules governing pole and conduit agreements which would restrict the rights of parties to file pole attachment complaints or delay access to poles and conduit.

U S WEST opposes proposals which presume that cable companies are providing telecommunications service throughout their franchise areas. Proponents of such presumptions are simply seeking a "short-cut" method for increasing pole attachment rates for cable providers. The use of such presumptions is at odds with both Section 224's requirements and the Commission's goal of enhancing cable and telecommunications competition. On the other hand, the National Cable Television Association ("NCTA") offers a much more reasonable method for determining which pole rates should apply when a cable company is providing telecommunications service in a portion of its cable franchise area. The Commission should incorporate NCTA's methodology in its rules implementing Section 224(e).

U S WEST adamantly opposes arguments asserting that a cable company providing two-way video service and Internet access is engaged in providing telecommunications service. The Commission has never found provision by a cable company of such services to be the provision of telecommunications service in the past and has no basis for doing so in this proceeding. Clearly, the Act's definition of

"cable service" is broad enough to include interactive video services in addition to "traditional" cable TV service.

Lastly, U S WEST believes that Bell Atlantic's proposal that all vacant conduit space be classified as "nonusable" for Section 224(e) cost allocation purposes deserves further consideration. Under the Act, all attaching parties have an equal right to use any spare conduit capacity. As such, it would be unfair to assign all the costs of vacant space to the conduit owner.

II. THE COMMISSION SHOULD NOT ALLOW UTILITIES TO USE THE ACT'S PREFERENCE FOR NEGOTIATED AGREEMENTS TO LIMIT ACCESS TO POLES AND CONDUIT

The pole attachment provisions of the 1996 Telecommunications Act (i.e., Section 224 as amended) were predicated on the assumption that individually negotiated agreements would continue to be the basis for most pole rental arrangements.[1] U S WEST supports the continued use of negotiated agreements.

Historically, the Commission has not become involved in pole attachment disputes until a formal complaint was filed.[2] It is no secret that pole lessees (e.g., cable companies) signed agreements that they believed contained unreasonable rates, terms, or conditions in order to gain timely access to poles. Lessees basically took the risk that the Commission would rectify things in a subsequent complaint

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[1] 47 USC § 224.

[2] In fact, the Commission's only formal pole attachment rules are found in the Commission's complaint procedures. See 47 CFR § 1.1401 et seq.

proceeding if the parties could not settle their differences in post-contract negotiations after the filing of a complaint. The ability to file complaints and challenge unreasonable rates (or terms) was often the only leverage that cable companies had in pole attachment negotiations with utilities.

The current approach to pole agreements has achieved a delicate, but workable, balance between pole lessees and lessors. Most pole attachment rates and terms have been established through negotiated agreements, and a minimum number of complaints have been filed with the Commission. Lessees have been able to obtain access to poles in a timely manner, and utilities have not had to file tariffs or cost studies for pole and conduit attachments. Without this right to challenge contract terms via the FCC complaint process, cable companies would be placed at a serious disadvantage in negotiations with pole owners. This was explicitly recognized by Congress when it adopted the 1978 Pole Attachment Act[3] and Congress did not provide any indication in adopting the 1996 Act that it wished to alter the balance of power in favor of utilities in pole attachment contract negotiations.

The Commission should do nothing in this proceeding to upset this balance by adopting further rules on negotiated agreements. In its Notice, the Commission proposed to continue to use its current complaint rules which require complainants to include a brief summary of all steps taken to resolve a dispute before filing a

[3] See the legislative history for the 1978 Pole Attachment Act, P.L. 95-234, Senate Report No. 95-580, 2 U.S. Code Cong. & Admin. News 109.

complaint.[4] The fact that these rules will now be extended to cover telecommunications carriers in addition to cable companies in no way justifies any modification in these well-tested rules. Despite this, numerous commenters view this proceeding as an opportunity to propose modifications which would both burden pole lessees and limit their rights.

The Edison Electric Institute and UTC, the Telecommunications Association ("UTC"), and others suggest that pole attachment agreements should be binding on the parties and that attachers should not have the right to use the Commission's complaint process once they have "voluntarily" entered into an agreement.[5] This is a blatant attempt to circumvent the statutory requirements of Section 224 and to estop lessees from exercising their rights. Implicit in this proposal is the assumption that the parties have equal bargaining power. Clearly, this is not the case when one party owns all the poles in an area and the other party requires access to those poles to conduct its business. Congress recognized this, as the Commission notes,[6] and the importance of access to poles and conduit in furthering

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[4] In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Notice of Proposed Rule Making, FCC 97-234, rel. Aug. 12, 1997, at ¶ 12 ("Notice").

[5] UTC at 7; New York State Investor Owned Electric Utilities ("New York Utilities") at 3, 6-7; American Electric Power Service Corporation, et al. ("AEP") at 11-20. See also Ohio Edison Company ("OEC") at 16-17.

[6] Notice ¶ 12.

competition. Therefore, UTC's proposal should be rejected as at odds with both the spirit and the letter of Section 224.[7]

UTC's proposal that the Commission require parties to negotiate or attempt to negotiate for a minimum of six months before a party may file a pole attachment complaint suffers from similar flaws.[8] For all intents and purposes, adoption of such a requirement would allow utilities to delay providing access to poles and conduit for a minimum period of six months. Clearly, this would not be in the public interest. The adoption of such a general requirement would serve no worthwhile purpose other than delaying access to poles and creating a barrier to competition. Furthermore, it is at odds with the Commission's earlier decision in its Interconnection Order.[9]

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[7] If pole owners are concerned that attachers may try to "improve on" their privately negotiated agreements by filing complaints with the Commission, as UTC suggests, pole owners can insist that the provisions of agreements be "nonseverable." This approach would not conflict with the Act nor would it require new Commission rules. It would allow lessees to obtain access to poles in a timely manner and would protect lessors by requiring renegotiation of the entire pole attachment agreement if a single provision is found to be unlawful.

[8] UTC at 6.

[9] In fact, in adopting its Interconnection Order in CC Docket No. 96-98, the Commission did not condition access to poles, conduits, and rights-of-way on the signing of a license agreement by the lessee. In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd. 15499, 16059 ¶ 1122, 16067-68 ¶ 1143, 16074 ¶ 1160 (1996)("Interconnection Order").

III. THE PROVISION OF TELECOMMUNICATIONS SERVICE TO A LIMITED NUMBER OF SUBSCRIBERS SHOULD NOT "TRIGGER" THE ASSESSMENT OF HIGHER POLE ATTACHMENT RATES FOR A CABLE COMPANY'S ENTIRE FRANCHISE AREA

Numerous commenters have proposed "artful" ways of applying higher telecommunications pole attachment rates to cable companies (i.e., after February 8, 2001). Some argue that the Commission should adopt a "rebuttable" presumption that cable providers have become telecommunication carriers[10] and that cable companies should bear the burden of proving and certifying that they are eligible for pole attachment rates derived in accordance with Section 224 (d).[11] Others have taken a slightly more creative approach by attempting to redefine Section 224(d)(3)'s requirement to be "pure" cable service – whatever that is – rather than cable service.[12]

As a backstop, some of these same commenters advocate a "contamination theory" approach to determining whether cable or telecommunications pole attachment rates should apply to a cable company providing telecommunications services. Under this theory, if a cable company provides telecommunications service to a single subscriber in its franchise area, all pole attachment rates will ratchet up to the higher telecommunications rate.[13]

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[10] AEP at 21-22, 30; OEC at 20.

[11] UTC at 9-10; OEC at 20-22.

[12] Ameritech at 4-5; AEP at 29-32.

[13] UTC at 9-10; OEC at 21-22.

Regardless of how creative or preposterous the proposals of commenters may be on the applicability of Section 224(e)'s rate provisions, the Commission should not lose sight of the Act's underlying goal of enhancing telecommunications competition. Any approach to applying Section 224(d) and (e) which would effectively penalize cable companies for providing telecommunications services in a portion of their franchised area must be rejected as at odds with the competitive goals of the Act.

Section 224(d)(3) is quite clear that cable companies providing telecommunications service are not governed by the rate provisions of Section 224(d). It is not clear as to how one determines when Section 224(d)'s provisions apply versus those of Section 224(e) when a cable company is providing telecommunications service in a portion of its franchise area (i.e., without examining and counting individual poles). One approach, of course, is to use the "contamination theory" referenced above. The drawback with this approach is that it penalizes cable companies for entering the telecommunications business and appears to conflict with Section 224(d)'s requirements.

A more competitive and equitable approach is that proposed by NCTA.[14] In those instances where a cable system has a limited number of direct telecommunications customers, NCTA suggests that a cable provider's poles be apportioned between those subject to "cable" rates and those subject to

[14] NCTA does not foresee a problem with distinct pole or conduit runs such as from an IXC point-of-presence ("POP") to a large customer. In those instances, it would be easy to "count" poles. NCTA at 23.

"telecommunications" rates on the basis of the number of subscribers.[15] That is, if a cable company leases 10,000 poles and 50 percent of its customers (e.g., 50,000 out of 100,000) subscribe to its telephone service, then 50 percent of the poles should be charged the telecommunications rate and 50 percent the cable rate. NCTA's proposal recognizes that cable companies providing telecommunications services must pay higher pole rates in accordance with Section 224(e). In addition, it has the advantage of being both equitable and simple to administer. U S WEST urges the Commission to adopt this proposal.

Also, NCTA's proposal can be implemented in a manner that addresses utility concerns with certification. While some of the utilities' proposed certification requirements are nothing more than lightly disguised barriers to entry, some type of notice is required when cable companies begin providing telecommunications service. U S WEST believes that a cable company should be required to notify affected utilities within its franchise area when it begins providing telecommunications service. Conversely, U S WEST opposes requiring cable companies to certify or prove that they do not provide telecommunications service. This is nonsense. It should be the inverse – notice is required only when cable companies begin to provide telecommunications service in a given area. This notice should also trigger periodic (e.g., annual) submissions of subscriber data in order to ascertain what percentage of poles should be assessed "telecommunications" rates rather than "cable" rates.

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[15] Id.

IV. SAFETY SPACE WOULD NOT EXIST IN THE ABSENCE OF ELECTRICAL ATTACHMENTS

A number of commenters assert that the 40-inch NESC-required safety space benefits all attaching parties.[16] As a result, they claim this space is the equivalent of a "common" cost which should be shared by all attaching entities.[17] These commenters, primarily electric utilities, reject the "but for" arguments of U S WEST and other parties. These arguments can be summarized as follows: "but for" the presence of electric service there would be no need for safety space – therefore, safety space should be assigned to electrical utilities as usable space. UTC asserts that in the absence of any other attaching entities (i.e., cable and telecommunications companies) there is no safety space.[18] While it is impossible to argue with this logic, it also follows that in such a situation an electric utility would pay for all of the usable and nonusable space on a pole. However, UTC's argument provides no basis for claiming that safety space should be assigned to any party other than electrics once there are other attaching entities on a pole.

Even if one concedes that electric utility arguments on the assignment of safety space make some sense when the poles being considered are electrical poles,

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[16] UTC at 17-19; OEC at 29-32; New York Utilities at 18-19; Electric Utility Coalition at 13-14.

[17] UTC goes as far as to argue that safety space is usable space which should be assigned to cable and telecommunications companies. UTC at 19.

[18] UTC at 17.

these arguments lose any appearance of logic when telephone poles are the reference point. Clearly, there is no need for safety space on telephone poles in the absence of electrical utility attachers. Only when electric utilities are present is there any need for safety space. As such, it would appear that the only logical assignment of safety space would be to electric utilities regardless of whether a power pole or telephone pole is being used.

V. THERE IS NO RATIONAL BASIS FOR CLAIMING THAT POLES AND CONDUITS THAT CARRY INFORMATION SERVICES AND TWO-WAY VIDEO SERVICES ARE SUBJECT TO SECTION 224(e)'S REQUIREMENTS

Numerous commenters assert that cable companies providing anything other than "pure" cable service must be classified as telecommunications carriers for purposes of determining maximum pole attachment rates under Section 224.[19] Commenters claim that two-way video, cable modem services (such as Internet access), and the delivery of information services do not fall within the scope of the definition of cable services[20] U S WEST disagrees. The Act's definition of the term "cable services" allows ample room to include services such as two-way video and Internet access.[21]

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[19] See, e.g., Ameritech at 4-5; OEC at 36-38; AEP at 29-32.

[20] 47 USC § 522(6).

[21] See NCTA at 6-7 n.9.

The Commission has never found these services to be telecommunications services when provided by a cable company within its franchise area.[22] Nor would it appear that Congress intended to limit its definition of cable services to "traditional" cable service when it adopted Section 522(6) of the Act or it would not have included Section 522(6)(B). Furthermore, in adopting the Telecommunications Act of 1996, Congress recognized that cable services were evolving and indicated that it did not intend that interactive cable services be subject to regulation as telecommunications services.[23] Therefore, cable companies providing two-way video services, cable modem service, and other information services are not engaged in the provision of telecommunications service as that term is used in Section 224. Provision of such services by a cable company in its franchise area does not "trigger" the effectiveness of Section 224(e) for purposes of determining maximum lawful pole attachment rates. The rates charged such cable companies should continue to be evaluated in light of the standards contained in Section 224(d).

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[22] Furthermore, Internet access would not be classified as a "telecommunications service" under the Act even if provided by a telecommunications carrier. See, e.g., In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 97-157, Report and Order at ¶ 789 (rel. May 8, 1997) (rejecting argument that Internet services are telecommunications). See also Bell Atlantic Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, CCB Pol. 96-09, DA 96-982 (rel. June 6, 1996) recon. pending on other grounds (a common carrier's Internet Service is not a telecommunications service). Cf. In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, FCC 97-158, First Report and Order at ¶¶ 341, 344-48 (May 16, 1997).

[23] 142 Cong. Rec. H1123 (Jan. 31, 1996).

VI. BELL ATLANTIC'S PROPOSAL THAT VACANT CONDUIT SPACE BE CLASSIFIED AS "NONUSABLE" DESERVES FURTHER CONSIDERATION

Section 224 drastically limits utilities in their ability to reserve space for future use. Incumbent LECs do not have a right to reserve space for future use, and electric utilities are limited in their ability to do so.[24] Thus, with few exceptions, all attaching parties have an equal right to use any spare conduit capacity. The question is -- who should bear the cost of this capacity. In the past, utilities largely constructed conduit capacity for their own use and bore the cost of any spare capacity. Clearly, with the passage of the 1996 Act, circumstances have changed.

Bell Atlantic argues that all spare or excess conduit capacity should be treated as unusable space for purposes of assigning costs in accordance with Section 224(e)(2).[25] Under this proposal, the costs of spare capacity would be shared equally by all attaching parties. This seems fair, given the fact that all attaching parties have an equal right to use any spare capacity for their future use and that utilities must consider the demands of other carriers when they construct additional capacity. The only caveat U S WEST would attach to this proposal is that cost of spare capacity and other nonusable space be apportioned equally between all attaching parties on the basis of the number of attachments.[26]

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[24] 47 USC § 224(f)(2).

[25] Bell Atlantic at 8.

[26] See U S WEST Comments filed herein Sep. 26, 1997 at 9.

VII. CONCLUSION

U S WEST urges the Commission to implement Section 224(e) in accordance with the foregoing comments and U S WEST's initial comments in this proceeding.

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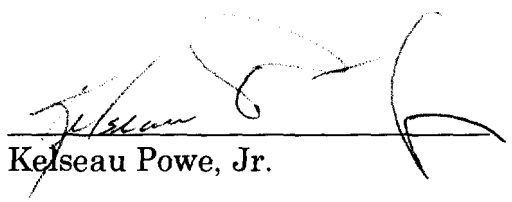
I, Kelseau Powe, Jr., do hereby certify that on this 21st day of October 1997, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST, INC.** to be served, via first class United States Mail, postage pre-paid, upon the persons listed on the attached service list.



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